

2012 WL 7151762 (C.D.Cal.) (Trial Motion, Memorandum and Affidavit)
United States District Court, C.D. California.

Frederick MEISEL, Plaintiff,

v.

BANKERS LIFE & CASUALTY COMPANY; and Does 1 through 40, Inclusive, Defendants.

No. 2:12-cv-03719 MWF(MANx).
November 5, 2012.

**Defendant Bankers Life and Casualty Company's Notice of Motion and Motion for
Partial Summary Judgment; Memorandum of Points and Authorities in Support Thereof**

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Hon. [Michael W. Fitzgerald](#).

(Statement of Uncontroverted Facts and Conclusions of Law and Declaration of Andrea R. Simmons and Affidavit of David Rikkers filed concurrently)

Hearing Date: December 3, 2012

Time: 10 a.m.

Courtroom: 1600

Action Filed: March 27, 2012

Trial Date: January 8, 2013

TO THE PLAINTIFF, FREDERICK MEISEL, AND TO HIS COUNSEL OF RECORD: PLEASE TAKE NOTICE that on December 3, 2012 at 10 a.m., or as soon

thereafter as counsel may be heard in Courtroom 1600 of the above-entitled Court, located at 312 North Spring Street, Los Angeles, California 90012, Defendant Bankers Life and Casualty Company will move for partial summary judgment, pursuant to [Federal Rule of Civil Procedure 56\(a\)](#), and request that the Court enter an Order finding that there is no dispute of genuine material fact that Defendant did not commit financial **elder abuse** under [California Welfare & Institutions Code § 15610.30 et seq.](#) (Count 3) against Plaintiff Frederick Meisel as a matter of law.

This motion is based on this Notice of Motion, the attached Memorandum of Points and Authorities, Defendant's Statement of Uncontroverted Facts and Conclusions of Law, the supporting Declaration of Andrea R. Simmons and Affidavit of David Rikkers, all of the pleadings, papers and records on file in this action and such evidence and argument as may be presented at the hearing of this motion.

This motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on October 26, 2012. (Simmons Dec. at ¶¶ 1-2.)

DATED: November 2, 2012

S.K. HUFFER & ASSOCIATES, P.C.

By: /s/Andrea R. Simmons

Andrea R. Simmons

Attorneys for Defendant

BANKERS LIFE AND CASUALTY

COMPANY

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In July 2002, Defendant Bankers Life and Casualty Company (“Bankers Life”) issued Plaintiff Frederick Meisel (“Mr. Meisel”) a long-term care insurance policy. Around May 2011, Mr. Meisel submitted a claim for benefits under the policy for in-home services provided to him by Elegant Home Care. Bankers Life denied the claim because Mr. Meisel was not Chronically Ill under the terms of the policy. As a result of the denial, Mr. Meisel filed this lawsuit alleging breach of contract (Count 1), breach of the duty of good faith and fair dealing (Count 2) and violation of [California Welfare and Institutions Code § 15610.30, et seq.](#) (Count 3), otherwise known as Financial **Elder Abuse**.

As the facts show, this is a breach of contract and bad faith case, not an **elder abuse** case. Mr. Meisel is unable to prove at least two essential elements of his **elder abuse** claim--that Bankers Life (1) deprived him of a property right and (2) engaged in conduct that was likely to be harmful to him. Therefore, Bankers Life is entitled to summary judgment on Mr. Meisel's **elder abuse** claim as a matter of law.

II. STATEMENT OF UNCONTROVERTED FACTS

A. The Long-Term Care Policy

On July 10, 2002, Bankers Life issued long-term care policy number 202,072,103 (the "Policy") to Mr. Meisel. (Uncontroverted Fact ("UF") No. 1.) The Policy is a Home Care Only policy, and it covers Qualified Long Term Care Services. (UF No. 2.) In order for an insured to receive benefits for Qualified Long Term Care Services, the insured must be a Chronically Ill Individual. Among other things, this requires that the insured receive certain assistance with the Activities of Daily Living or have a Severe Cognitive Impairment. (UF No. 3.)

On March 30, 2011, Elegant Home Care ("Elegant") began performing services for Mr. Meisel. (UF No. 4.) On June 13, 2011, Mr. Meisel submitted a claim for Elegant's services. (UF No. 5.) On July 13, 2011, after reviewing the claim, Bankers Life determined that Mr. Meisel was not receiving assistance with the Activities of Daily Living or suffering from a Severe Cognitive Impairment under the terms of the Policy. Therefore, Bankers Life denied the claim. (UF No. 6.)

Mr. Meisel stopped receiving services on September 15, 2011. If Bankers Life had paid Mr. Meisel's claim, he still would have stopped receiving services at that time because his condition had improved. Mr. Meisel claims the denial cost him \$23,800.00 out-of-pocket. (UF No. 7.)

B. The Annuities and Mr. Meisel's Financial Condition

On July 9, 2002, Bankers Life issued annuity number 7,736,069 ("Annuity 069") to Mr. Meisel for a single premium of \$72,918.72. (UF No. 8.) At the end of 2006, Mr. Meisel moved in with Dorothy Clinton. (UF No. 15.) On July 9, 2011, Annuity 069 had an account value of \$53,080.98 and a cash surrender value of \$52,101.96. (UF No. 9.) On July 9, 2012, Annuity 069 had an account value of \$49,683.82 and a cash surrender value of \$49,683.82. (UF No. 10.)

On July 16, 2002, Bankers Life issued annuity number 7,736,500 ("Annuity 500") to Mr. Meisel for a single premium of \$44,478.00. (UF No. 11.) On July 16, 2011, Annuity 500 had an account value of \$25,484.13 and a cash surrender value of \$25,001.85. (UF No. 12.) On July 16, 2012, Annuity 500 had an account value of \$22,531.38 and a cash surrender value of \$22,531.38. (UF No. 13.) Annuity 500 is a tax-qualified IRA annuity that requires Mr. Meisel to make minimum distributions each year. Since 2003, Mr. Meisel has regularly taken withdrawals from Annuity 500 to comply with the minimum distribution requirements. (UF No. 14.)

Mr. Meisel was "not going to be broke" because of the denial. (UF No. 16.)

III. THERE WAS NO FINANCIAL **ELDER ABUSE**

A. History of California's **Elder Abuse** Statute

In 1982, the California Legislature recognized that dependent adults may be subjected to **abuse**, neglect, or abandonment and added the **Elder Abuse** Act to the California Welfare and Institutions Code. *Delaney v. Baker*, 971 P.2d 986, 992, 20 Cal. 4th 23 (Cal. 1999). The Act focused on reporting and using law enforcement to stop **elder abuse**. *Id.*

“In the 1991 amendments . . . the focus shifted to private, civil enforcement of laws against **elder abuse** and neglect.” *Id.* The purpose of these amendments was to “enable interested persons to engage attorneys to take up the cause of **abused elderly** persons and dependent adults” by allowing for attorney’s fees and increased damage awards. *Id.* (citations omitted).

In 1994, the Legislature added “fiduciary **abuse**” as a form of protected **elder abuse** with § 15610.30. Stats. 1994, ch. 594, § 3. In 1998, the Legislature replaced the term “fiduciary **abuse**” with the term “financial **abuse**” and further broadened the statute’s proscriptions. Stats. 1998, ch. 946. The statute was amended again in 2000, and from 2001 through 2008, § 15610.30 provided as follows:

(a) “Financial **abuse**” of an **elder** or dependent adult occurs when a person or entity does any of the following:

(1) Takes, secretes, appropriates, obtains, or retains real or personal property of an **elder** or dependent adult for a wrongful use or with intent to defraud or both.

(2) Assists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an **elder** or dependent adult for a wrongful use or with intent to defraud, or both.

(b) A person or entity shall be deemed to have taken, secreted, appropriated, or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates or retains possession of property in bad faith.

(1) A person or entity shall be deemed to have acted in bad faith if the person or entity knew or should have known that the **elder** or dependent adult had the right to have the property transferred or made readily available to the **elder** or dependent adult or to his representative.

(2) For the purposes of this section, a person or entity should have known of a right specified in paragraph (1) if, on the basis of the information received by the person or entity or the person or entity’s authorized third party, or both, it is obvious to a reasonable person that the **elder** or dependent adult has a right specified in paragraph (1).

* * *

Stats. 2000, ch. 442, § 5 (prevailed).

B. The 2008 Amendments

In 2008, effective January 1, 2009, the Legislature made significant changes to the statute by creating new liability for persons who unduly influence **elders**. Now, § 15610.30 provides:

(a) “Financial **abuse**” of an **elder** or dependent adult occurs when a person or entity does any of the following:

(1) Takes, secretes, appropriates, obtains or retains real or personal property of an **elder** or dependent adult for a wrongful use or with intent to defraud, or both.

(2) Assists in taking, secreting, appropriating, obtaining or retaining real or personal property of an **elder** or dependent adult for a wrongful use or with intent to defraud, or both.

(3) Takes, secretes, appropriates, obtains, or retains, or assists in taking, secreting, appropriating, obtaining, or retaining, real or personal property of an **elder** or dependent adult *by undue influence*, as defined in [Section 1575 of the Civil Code](#).

(b) A person or entity shall be deemed to have taken, secreted, appropriated, or obtained, or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates, obtains, or retains the property and the person or entity knew or should have known that this conduct is likely to be harmful to the **elder** or dependent adult.

(c) For purposes of this section, a person or entity takes, secretes, appropriates, obtains, or retains real or personal property when an **elder** or dependent is *deprived of any property right, including by means of an agreement, donative transfer, or testamentary bequest*, regardless of whether the property is held directly or by a representative of an **elder** or dependent adult.

* * *

Stats. 2008, ch. 475, § 1; SB 1140 (emphasis added).

As shown below, Mr. Meisel is unable to prove the elements in [subdivisions \(b\) and \(c\) of § 15610.30](#). As a matter of law, Mr. Meisel was not deprived of a property right by means of an agreement or otherwise nor did Bankers Life engage in conduct likely to be harmful to him. Therefore, Bankers Life is entitled to summary judgment on Mr. Meisel's **elder abuse** claim. (For the Court's convenience, the statutes and legislative history are attached as Exhibit 1 in the order they appear herein.)

C. Mr. Meisel Was Not Deprived of a Property Right by Means of an Agreement or Otherwise

Bankers Life anticipates Mr. Meisel will argue that the inclusion of the word “agreement” in the specified forms of takings under [§ 15610.30\(c\)](#) and the broadening in scope of the statute over time allow him to sue for financial **elder abuse** because he is **elderly** and the Policy is a contractual agreement. This interpretation of the statute is not correct.

As shown above, with the addition of [§ 15610.30\(a\)\(3\)](#), the 2008 amendments created new liability for persons who *unduly influence* an **elder's** disposition of property. It is clear from the statute that the “by means of agreement, donative transfer, or testamentary bequest” language used in [§ 15610.30\(c\)](#) *specifically relates to* ways in which a person might unduly influence an **elder's** disposition of property--not contracts in general. Because there is no allegation that Bankers Life unduly influenced Mr. Meisel's disposition of property (as in cases involving the pressured sale of imprudent investments or mortgage financing), the fact that the Policy is an agreement is immaterial cannot be used to avoid summary judgment.

To be sure, although counsel could find no published opinions on point, there is substantial persuasive authority to support this conclusion that SB 1140 did not expand the scope of [§ 15610.30](#) to cover the facts in this case. First, the *Legislative Counsel's Digest* for SB 1140 states:

This bill would, among other things, add to the definition of financial **abuse** the taking, secreting, appropriating, obtaining, or retaining, or assisting in the taking, secreting, appropriating, obtaining, or retaining, of real or personal property of an **elder** or dependent adult by *undue influence*, as defined. *It would also make various conforming changes to these provisions.*

(emphasis added). Nowhere in the digest does it suggest that SB 1140 expanded the scope of the statute to cover all contractual agreements with **elders**.

Second, the Assembly Committee on Judiciary's Report on SB 1140 states that the amendments will cause *three* changes to the statute--none of which suggest **elder abuse** liability now applies to all contractual agreements with **elders**:

The bill [expands the statute] to better protect vulnerable adults by (1) adding the taking or appropriation of property by undue influence to the definition of financial **abuse**; (2) creating a new cause of action for financial **abuse** against a person who takes property from an **elder** or dependent adult who lacks capacity

and then refuses to return the property after a demand for return of the property is made; (3) and establishing that the statute of limitations for the filing of an EADACPA financial **abuse** action is four years from the date the plaintiff discovers, or should have discovered, the facts constituting the **abuse**.

Third, the Senate Judiciary Committee's Report on SB 1140 (2007-2008 Reg. Sess.) also shows that the broadening of the prohibited forms of takings to include "agreements" is because of the newly-created liability for undue influence:

2. A third basis for financial **abuse: undue influence**

* * *

SB 1140 would add *undue influence* as a third basis for financial **abuse** of an **elder** or dependent adult. Proponents believe that this is necessary because **elders** are often exploited through undue influence and under circumstances where the statutory elements necessary for financial **abuse** (taking for a wrongful use, intent to defraud) are lacking, and thus an important remedy of EADACPA, attorney's fees and costs to the plaintiff, are not available.

*For example, an **elder** may be pressured by a family member to change the terms of a will or encouraged strongly by the **elder's** longtime stockbroker to purchase 1000 shares of stocks in a company that became bankrupt soon thereafter.* In both cases there might not have been any misrepresentation of fact, nor would the property taken have been one that the **elder** had a right to "make readily available." In other words, the conduct of the potential **abuser** would not fit the current definition of financial **abuse**, yet the results are the same, i.e., the **elder** is unknowingly deprived of his or her property. Without the availability of an award of attorney's fees and costs to the plaintiff, as there would be in an EADACPA action, an **elder** or dependent adult would have to expend more money to rescind the action taken or recoup money that was lost.

* * *

5. SB 1140 would redefine taking or appropriating property

* * *

SB 1140 would [change the prior 15610.30(b)(1)-(2)] and instead provide that a person takes, appropriates, or retains real or personal property when an **elder** or dependent adult is deprived of any property right, including by means of an agreement, donative transfer, or testamentary bequest, and regardless of whether the property is held directly by the **elder** or dependent adult or by an attorney-in-fact, conservator, trustee, or other representative of the **elder** or dependent adult.

This language clarifies to a great degree *what kind of conduct constitutes financial **abuse**, what instrument of transfer would be subject to scrutiny*, and that it matters not if the **elder** or dependent adult holds the property right directly or indirectly through others.

* * *

(emphasis added) (*See also*, Senate Rules Committee Third Reading (April 1, 2008 and June 2, 2008).

Fourth, comments from a drafter of SB 1140 also suggest that the expansion of liability is only directed towards cases involving undue influence:

Since 1991 the legal definition of financial **abuse** had required an **elder** to prove his or her property was taken for a wrongful use or with the intent to defraud. In many instances, however, a perpetrator does not exploit an **elder** through overt fraud, *but rather by unduly influencing the **elder's** decisions*. In such cases, proving the defendant had the requisite intent can be difficult. *But SB 1140 revised the definition by adding undue influence as a basis for proving financial **abuse**.*

Steven Riess, *Combating Financial **Abuse** of **Elders*** (August 2009) *California Lawyer*, p 19 (emphasis added).

Because Mr. Meisel's theory for establishing how Bankers Life deprived him of a property right rests on an incorrect and unreasonable interpretation of the word "agreement" and one that is contradicted by legislative history, his claim for **elder abuse** must fail.

D. Additionally, Bankers Life's Denial Was Not "Likely to be Harmful" to Mr. Meisel

As shown above, Mr. Meisel must *also* prove that Bankers Life knew or should have known that denying the claim was "likely to be harmful" to him. *See*, § 15610.30(b). Considering the relative size of Mr. Meisel's claim, the value of his annuities with Bankers Life and his withdrawals from those annuities, the denial was not likely to be harmful, and it was not, in fact, harmful to him as a matter of law.

In July 2011, when Bankers Life first denied Mr. Meisel's claim, the Annuities had an account value of \$78,565.11 and a cash surrender value of \$77,103.81. (UF Nos. 9, 12.) In July 2012, approximately 10 months after Mr. Meisel had stopped receiving care, the Annuities had an account value of \$72,215.20 and a cash surrender value of \$72,215.20. (UF Nos. 10, 13.) Thus, the value of these assets was only reduced by five or six thousand dollars during the period after the denial.

In fact, compared to Mr. Meisel's withdrawals prior to the July 13, 2011 denial, it would appear that Mr. Meisel's overall financial picture remained the same during the period after the denial. With regards to Annuity 069, Mr. Meisel made the following withdrawals:

July 9, 2002 -- July 8, 2003	\$0
July 9, 2003 -- July 8, 2004	\$7,876.14
July 9, 2004 -- July 8, 2005	\$7,510.26
July 9, 2005 -- July 8, 2006	\$6,691.93
July 9, 2006 -- July 8, 2007	\$6,443.18
July 9, 2007 -- July 9, 2010	\$0
July 9, 2010 -- July 9, 2011	\$17,221.26
July 9, 2011 -- July 9, 2012	\$5,367.58

(UF Nos. 8-10.)

With regards to Annuity 500, Mr. Meisel made regular withdrawals due to its tax status. (UF No. 14.) Specifically, from January 1, 2005 through December 31, 2006, Mr. Meisel withdrew \$15,000.00, while he only withdrew \$3,879.36 from July 16, 2011

through July 16, 2012, the period immediately following the denial. (UF No. 11-13.) Additionally, Mr. Meisel has had lower living expenses since the end of 2006, which is consistent with the smaller withdrawal amounts shown above. At the end of 2006, Mr. Meisel moved in with Dorothy Clinton (it does not appear that Mr. Meisel pays rent). (UF No. 15.)

Lastly, the denial did not affect the care Mr. Meisel received nor has it caused him financial hardship. Mr. Meisel stopped receiving services in September 2011 and *still* would have stopped receiving services in September 2011 *even if* Bankers Life had paid his claim as his health had improved. (UF No. 7.) Also, in his own words, Mr. Meisel was “not going to be broke” because of the denial:

Q. Okay. Did you still have some money left in the annuity?

A. I have some money left in there. I didn't want to go down to broke. I'm not going to be broke. I can -- I can learn to live on -- within my means. I'm not extravagant or nothing.

(UF No. 16.) This is also supported by the timing of certain events. Mr. Meisel began receiving services from Elegant in March 2011, waited until June 13, 2011 to submit his claim and further waited until October 18, 2011 to submit his appeal, which was a month *after* he stopped receiving services from Elegant. (UF Nos. 4, 5, 7.) Thus, it further does not appear Mr. Meisel was in financial distress.

In light of the above facts, no reasonable jury could find that Bankers Life's denial was likely to be harmful to Mr. Meisel. Therefore, Bankers Life is further entitled to summary judgment on Mr. Meisel's **elder abuse** claim.

IV. CONCLUSION

WHEREFORE, in view of the foregoing, Defendant Bankers Life and Casualty Company respectfully requests an Order granting its Motion for Partial Summary Judgment and denying Plaintiff Frederick Meisel's claim for financial **elder abuse**.

DATED: November 2, 2012

S.K. HUFFER & ASSOCIATES, P.C.

By: /s/Andrea R. Simmons

Andrea R. Simmons

Attorneys for Defendant

BANKERS LIFE AND CASUALTY

COMPANY